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Paper No.

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In re Application of	:	OFFICE OF PETITIONS
Worgall et al.	:	
Application No. 10/712,684	:	
Filed: November 14, 2003	:	ON PETITION
Attorney Docket Number:	:	
0575/66854-A/JPW/AJM	:	

This is in response to the Petition Under 37 C.F.R. 1.183, filed September 13, 2004, requesting the application be accorded a filing date of November 12, 2003, instead of the presently accorded filing date of November 14, 2003.

Petitioner states that this application was mailed by first class mail to the Office on or about November 11, 2003. Petitioner states that the application should have been mailed via Express Mail, but was inadvertently placed in first class mail. Also, Petitioner avers, November 11, 2003, was a Federal Holiday and the last date to file this application and receive priority to the provisional application was November 12, 2003.

The evidence and arguments submitted by petitioner have been considered; however, they are not convincing that this is an extraordinary situation where justice requires suspension of the rules.

35 U.S.C. 21(a) provides that:

The Director may by rule prescribe that any paper or fee required to be filed in the Patent and Trademark Office will be considered filed in the Office on the date on which it was deposited with the United States Postal Service or would have been deposited with the United States Postal Service but for postal service interruptions or emergencies designated by the Director.

The Director may, but is not required to, accept the mailing date as the filing date. The Director has determined that only the "Express Mail" procedure can be used for this purpose because the use of "Express Mail" provides very specific identifying information in advance which establishes both the date of mailing and the particular papers being filed.

Because the filing date of an application is much more critical than the filing date of papers accepted under 37 CFR 1.8, the USPTO promulgated a separate rule, 37 CFR 1.10, which sets forth a specific procedure which must be followed in order to establish the filing date as the date of deposit with the United States Postal Service (USPS) instead of the date of receipt in the Office.

The procedure in 37 CFR 1.10 requires the use of the "Express Mail Post Office to Addressee" service of the USPS.

Correspondence sent by the "Express Mail Post Office to Addressee" service is considered filed in the Office on the "date-in" entered by the USPS. If the USPS deposit date cannot be determined, the correspondence will be accorded the date of receipt in the Office as the filing date. If the procedure is not followed, applicants bear the risk of any delay in the delivery of the application papers to the Office.

In the instant petition, there is no allegation that the application papers deposited on or about November 11, 2003, with the USPS as first class mail to the Office, were deposited in compliance with the "Express Mail" procedures set forth in 37 CFR 1.10. Petitioner had the option of depositing the application papers in "Express Mail" service on November 12, 2003, in order to obtain the benefits of 37 CFR 1.10. Had petitioner followed the procedure set forth in 37 CFR 1.10, the application could have been accorded a filing date as of the date of deposit in "Express Mail." Thus, petitioner could have avoided the instant predicament merely by following the procedures established by the Director. Instead, petitioner chose to deposit the application papers in first class mail and, as such, assumed the risk of any delay in the delivery to the Office. Petitioner's failure to take advantage of the established procedures is not a justification for accepting a date based upon the November 12, 2003, mailing of the instant application papers by first class mail as the filing date of the above-identified application. Therefore, the application is

only entitled to the November 14, 2003, receipt date as the filing date of the application.

The best evidence of when particular application papers were actually received by the USPTO is a postcard receipt containing a specific itemization of all the items being submitted. See MPEP 503. In the absence of a postcard receipt indicating the receipt in the USPTO of the application papers on an earlier date, the USPTO must rely on the Official record, which indicates that the instant application papers were not received in the USPTO until November 14, 2003.

In view of the above, the petition is dismissed. No petition fee is required.

The application is an Image File Wrapper ("IFW"), and as such, no forwarding of the file is necessary.

Telephone inquiries concerning this matter should be directed to the undersigned at (571-272-3232) 305-0014.

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